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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WILLIE THOMAS SAMPLE, JR., Defendant and Appellant.	A109173 (Solano County Super. Ct. Nos. VCR 146008, 146010, 146011, and 144334)

Defendant Willie Thomas Sample, Jr., appeals his conviction by jury trial of second degree robbery (Pen. Code, § 211) and driving with a willful or wanton disregard for the safety of persons or property while evading police (Veh. Code, § 2800.2, subd. (a)). The trial court found true four prior prison term allegations (Pen. Code, § 667.5), and two prior strike convictions (Pen. Code, §§ 667, subd. (a)(1), 667, subds. (b)-(i), 1170.12, subd. (a)).[1] Defendant raises numerous claims of error on appeal. We remand solely for recalculation of defendant's presentence custody credit and otherwise affirm the judgment.

[1] The trial court declared a mistrial on two counts of residential robbery in concert alleged to have occurred on January 8, 2000. Defendant was sentenced to a state prison term of 50 years to life.

BACKGROUND

September 1999 Robbery

Eighty-one-year-old Jessie Lemas testified that from 1988 to 1999, she and her stepson owned and operated the Pastime Bar in Benicia.[2] She identified defendant as a regular customer of the bar, whom she knew as "Willie."

At approximately noon on September 25, 1999, Lemas was in the bar's office counting the previous day's receipts, which included cash and checks. Between $500 and $700 in cash and checks was on the desk within arm's length of Lemas. Defendant twice came to the office doorway and asked Lemas where the bar's current owners were, and Lemas twice responded that she did not know. Defendant then asked to use the phone and Lemas handed him a cordless phone. Five or six minutes later, defendant returned the phone to Lemas at her request. He then reached over her shoulder and grabbed the receipts on the desk. When Lemas started to get up, defendant forcefully pushed her back down into her chair, took a cigar box containing drink chips and loose change totaling between $160 and $200. Defendant again forcefully pushed Lemas back into her chair when she tried to stand up. As defendant ran out of the bar with the receipts and cigar box, Lemas yelled, "Go get Willie." She estimated that $800 to $900 was taken in the robbery.

Bryan Silva and his stepfather, Henry Warner, were at the bar at the time of the robbery. Silva heard Lemas scream and saw defendant holding a box, running out the bar's back door. Silva and Warner chased defendant into the street. Defendant threw chips and change from the box in an effort to hinder the chase and Silva lost sight of him. Silva and Warner recovered some of the chips and change and returned them to the bar. Silva admitted a 1998 misdemeanor false personation conviction.

Frank Dunne was also at the bar at the time of the robbery. According to him, defendant entered the bar, ordered a beer, drank a portion of it and "disappeared." About

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[2] Lemas was conditionally examined in August 2003 and a videotape of her testimony was played for the jury several months later at trial.

five minutes later, Dunne heard Lemas shout, "he stole the money." Dunne saw bar patrons run out the back of the bar and saw a "figure" disappear through an area of apartments. Dunne joined the chase in his car and saw defendant, who Dunne described as out of breath, sweating, and walking fast. When Dunne saw defendant taking money and checks out of a box defendant was holding, Dunne yelled for him to put the money down. Defendant looked at Dunne, ignored him, and continued walking. Dunne saw defendant get into a small sedan driven by someone else and flee.

Benicia Police Sergeant John Daley took Lemas's report. Lemas told him that $575 in cash and $145 in personal checks had been taken in the robbery, and $76 in cash was returned. Lemas, Dunne, Warner and bar patron McKendry all identified defendant from a photo lineup Daley presented them.

January 9, 2000 Evasion of Police

David Murray, a longtime friend of defendant, testified that just before midnight on January 8, 2000, defendant and two other men burst into Murray's Vallejo home. Defendant held a gun and demanded money from Murray while another man tied Murray's hands and feet and put tape over his mouth. Murray said that the men took his wallet and ransacked his home. He later noticed that his GMC pickup truck and Mercedes were missing from in front of his house and called 911.

Shortly before midnight on January 8, 2000, uniformed Vallejo Police Officers John Ehman and Kevin Bartlett were each driving a marked patrol car with overhead lights and siren. They each received the dispatch regarding a robbery and were on the lookout for a stolen silver Mercedes, a white GMC pickup truck and a Nissan. At 12:22 a.m. on January 9, Officer Ehman spotted the Mercedes and the pickup truck directly behind it on Interstate 80, and he and several other patrol cars followed the vehicles. When Ehman decided to "pull over" the Mercedes and activated his lights and siren, the Mercedes accelerated up to 120 miles per hour, weaving in and out of the lanes of freeway traffic. The high speed chase continued off and then back onto the freeway at a speed of at least 120 miles per hour. Thereafter, the Mercedes suddenly veered across three lanes of freeway traffic and exited the freeway at the Carlson Street off-ramp. The

police continued to chase the Mercedes on Carlson Street. Although the posted speed limit on Carlson Street was 35 miles per hour, the police car in pursuit of the Mercedes traveled at speeds between 70 and 100 miles per hour. Ultimately, the Mercedes, driven by defendant at 50 to 70 miles per hour in a residential area with a 25 mile per hour speed limit, crashed into a parked car. Defendant was apprehended as he tried to flee on foot.

Vallejo Police Officer Drew Ramsay corroborated Officer Ehman's testimony that the police pursuit of the Mercedes while on the freeway exceeded speeds of 100 miles per hour, while other freeway motorists were trying to get out of the way.
Ramsay also stated that the police pursuit of the Mercedes reached about 70 miles per hour within the residential area which was subject to a 25 mile per hour speed limit.

The Defense

Defendant testified that in 1992 he was convicted of second degree burglary and another felony, in 1993 he was convicted of cocaine for sale, and in 1994 he was convicted of grand theft. He said he was a regular customer at the Pastime Bar, which he entered at 11:00 a.m. on the day of the instant robbery, to meet Shawn, another bar patron. Shawn was going to repay defendant for money he borrowed from defendant for gambling and drugs. Defendant said Lemas let him use the phone to call his wife, after which he and Shawn talked. Shawn cashed a check at the bar and Lemas was counting out the money. Shawn told defendant he had $500 "right here" and defendant picked up "[his] money" from the desk, told Shawn he would see him later, and left the bar. Defendant denied pushing or touching Lemas and said she never indicated that he could not take the money. He unsuccessfully ran to catch a bus to Vallejo, and paid an acquaintance $5 to drive him there so he could pay some bills. Defendant denied taking a cigar box or drink chips and denied taking any money without permission.

Defendant also denied robbing Murray. He said that Murray agreed to give him the Mercedes and some electronics and computer equipment in exchange for money Murray owed him. On January 8, 2000, defendant went with his nephew and his nephew's friend to Murray's house. While Murray remained seated in his house,

defendant left in the Mercedes en route for Oakland, followed by the pickup truck driven by his nephew's friend, which Murray let defendant use to move the equipment.

As defendant drove westbound on Highway 80 past the Carquinez Bridge followed by the pickup truck, he noticed police cars stopped on the side of the highway. He continued to drive at the speed limit. He then saw an officer pull behind him but he continued driving. Thereafter, defendant saw the pickup truck get pulled over by police and about four or five patrol cars activated their lights "on" defendant. In response, defendant accelerated because he had been drinking beer and did not trust police officers, given his life experience. He described his acceleration as a "natural reaction." He admitted driving at 90 or 95 miles per hour while drinking beer, but denied maneuvering through traffic. He said he was going no faster than 40 or 45 miles per hour in the residential area. He intended to drive to a "secure" residential area, but crashed into a truck as he attempted to retrieve the beer he dropped. He was apprehended as he tried to run to a residence.

Rebuttal

Warner testified that there was no one else near the doorway while defendant was talking on the phone prior to the robbery. He also said he had been going to the bar for about 20 years and knew of no regular customer named "Shawn."

DISCUSSION

I. *The Motion for New Trial on Grounds of Incompetence of Counsel Was Properly Denied*

Defendant contends the court erred in denying his motion for new trial on the ground of ineffective assistance of counsel based on defense counsel's failure to seek dismissal of the Vehicle Code section 2800.2, subdivision (a) (hereafter section 2800.2(a))[3] offense prior to trial based on lack of venue in Solano County.

A claim of ineffective assistance of counsel may be argued in a motion for new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) "To prevail[,] a defendant must

[3] All undesignated section references are to the Vehicle Code.

show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.)

The declaration of defendant's trial counsel submitted in support of the new trial motion stated: "I was fully aware of where the charged violation of California Penal Code section 2800.2 took place.[4] Said alleged violation did not begin until after Defendant would have crossed the Carquinez Bridge,[5] having left Solano County, and entered into Contra Costa County. [¶] Despite this knowledge of the facts, it did not occur to me to contest the issue of venue with regard to this charge, and I in fact took no action to address this issue." The trial court denied the motion for new trial on the ground that "this was a continuous event" and "there was no prejudice here, . . . the results would have been the same."

Defendant argues that his counsel's failure to object to venue on the section 2800.2(a) offense was prejudicial because Contra Costa County prosecutors may not have chosen to charge this offense, or may have chosen not to charge it as a third strike offense; and his robbery conviction resulted in part from detailed evidence presented on the section 2800.2(a) offense.

We conclude defendant has failed to demonstrate prejudice. For purposes of demonstrating ineffective assistance of counsel, "[p]rejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings*

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4 In referring to Penal Code section 2800.2, counsel obviously intended to cite to Vehicle Code section 2800.2.

(1991) 53 Cal.3d 334, 357.) Under this standard, petitioner must show that absent the deficient performance there would have been at least "a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.) Defendant must prove prejudice that is a " ' "demonstrable reality," ' " not merely speculation. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

In *People v. Simon* (2001) 25 Cal.4th 1082, 1103-1104, our Supreme Court held that a felony defendant forfeits a claim of improper venue by failing to assert it prior to trial. *Simon* explained that "an objection to venue, if sustained, does not signify that the defendant will avoid trial on the charges altogether, but instead means only that he or she will face trial in another location." (*Id.* at p. 1106.) Nothing in the record before us indicates that defendant would have obtained a more favorable outcome in Contra Costa County. It is mere speculation that Contra Costa County prosecutors would not have prosecuted the section 2800.2(a) offense or would not have charged it as a third strike.

Similarly, based on the record before us, we cannot conclude that defendant would have obtained a different result on the robbery charge had the section 2800.2(a) charge been tried in Contra Costa County. Defendant appears to concede that some evidence regarding the police chase could have been admitted as consciousness of guilt in a separate trial, but argues that the extra-evidentiary details necessary to prove the section 2800.2(a) violation suggested that he was desperate enough to commit a crime despite the near certainty that he would be apprehended. He further argues that this was fatal to his argument that he would not have committed a robbery in a place in which he was so well known. Defendant's argument is undercut by the fact that despite the evidence supporting the section 2800.2(a) offense, the jury acquitted him of the two robbery counts stemming from his alleged robbery committed hours before his commission of the section 2800.2(a) offense. Moreover, because the evidence regarding the September 1999

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[5] Defendant's opening brief contains a footnote stating that it was undisputed that the Solano/Contra Costa county line is mid-span on the Carquinez Bridge.

robbery of the bar was overwhelming, it is unlikely that the jury would convict defendant of the robbery solely because he evaded police four months later.

In conclusion, defendant failed to demonstrate ineffective assistance of counsel, and his new trial motion on that ground was properly denied.

II. *The Motion For New Trial On Grounds Of Jury Misconduct Was Properly Denied*

Next, defendant contends the court erred in denying his motion for new trial on grounds of juror misconduct, and in failing to conduct an evidentiary hearing on the allegations of jury misconduct.

During trial, on November 25, 2003, a court employee informed the court that he was told by juror No. 1's husband that "there is a lady who's been in attendance in the audience who has been making statements, . . . out in the hallway relating to these proceedings and this defendant." The court examined juror No. 1, who said she had not heard any member of the audience make any statements about the defendant's guilt or innocence, and did not know what her husband was talking about.

Following the jury verdict, defendant moved for new trial based on juror misconduct. In support, defendant submitted the October 20, 2004 declaration of his girlfriend, Alisa McGraw. McGraw stated she had attended many of his trial sessions. The declaration also stated: "2. After the jury was selected in this case and the taking of evidence had started, I was seated in room 106, the traffic court clerk's office, when a person known to me to be a seated juror in the case approached me and initiated a conversation. The juror who approached me was a middle-aged Filipino woman who used a cane to walk. I believe she was seated in spot number '6' in the jury box. [¶] 3. The juror started the conversation by noting that I was 'the only one there' for [defendant]. The juror then asked me a number of questions concerning [defendant's] personal life and my relationship to it, including (1) how long I had known him; (2) whether I had ever lived with him (apparently the juror surmised, correctly that I was a girlfriend of [defendant's]); (3) whether [defendant] was married; (4) whether he had children; (5) how old his son was; (6) whether he was gainfully employed and where he worked; and (7) how old he was. I supplied answers to these questions. During the

discussion, the juror was informed that this was a 'three strikes' case and that [defendant] could be imprisoned for life if convicted. [¶] 4. When I had the conversation with this juror, I was aware that the juror had been told not to talk with me. I did not realize that this obligation was reciprocal, and therefore did not feel that I was acting improperly. [¶] 5. I have had seven misdemeanor convictions for petty theft and one for battery, as well as a felony conviction for forgery. I do not believe, however, that I am currently on probation or any other legal restraint."

Defendant argued that because the trial on the issue of his prior strike convictions was bifurcated, any exposure to the three strikes issue by the jurors was presumptively prejudicial. Based on McGraw's declaration, defendant requested that the court make an inquiry into the possibility of juror misconduct. He posited that perhaps the "lady" mentioned by juror No. 1's husband was McGraw, and that a juror other than No. 1 improperly talked with McGraw.

The prosecutor opposed the motion on the ground that defendant's showing was insufficient to warrant a hearing since there was nothing indicating a substantial likelihood of bias against defendant. The prosecutor argued that it was not clear that McGraw had spoken with a juror or alternate juror since juror No. 6 was a male and juror No. 12 was a younger female. The prosecutor also argued that McGraw had not brought the conversation to the court's attention at the time of its occurrence, the questions raised by the alleged juror did not indicate bias against the defendant, there was no evidence that the alleged juror to whom McGraw spoke considered any information in the conversation against the defendant, any unfair prejudice was removed when defendant admitted having previously suffered four felony convictions, and the jury's deliberation over several days resulting in an acquittal on two robbery charges indicated a lack of bias against defendant. In denying the request for a hearing and the new trial motion, the court found the "threshold criteria" had not been met.

The determination of a motion for new trial based on jury misconduct lies within the discretion of the trial court, and such determination will not be disturbed on appeal unless a manifest and unmistakable abuse of that discretion appears. (*People v. Delgado*

(1993) 5 Cal.4th 312, 328; *People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.) The trial court's credibility determinations are upheld if supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

"When a defendant moves for a new trial based on jury misconduct, the trial court undertakes a three-part inquiry. 'First, the court must determine whether the evidence presented for its consideration is admissible . . . . [¶] Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct. . . . [¶] Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial.' [Citation.]" (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 475.)

The trial court has discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) Such a hearing need not be held in every instance of alleged jury misconduct and should not be used as a "fishing expedition" to search for possible jury misconduct. (*Ibid.*) A hearing should be held only when the defense presents evidence demonstrating a "strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Ibid.*)

Defendant contends the incident described by McGraw was jury misconduct because it constituted receipt of information about his record from sources outside the evidence presented at trial, and the juror made affirmative contact with another person about the case in violation of the court's repeated admonitions. He asserts that there was a competent, unrebutted showing of misconduct and a substantial likelihood that at least one juror was impermissibly influenced to defendant's detriment. Finally, he argues that the court abused its discretion in refusing to conduct an evidentiary hearing to determine the truth or falsity of the alleged jury misconduct.

We conclude defendant has failed to demonstrate any abuse of discretion by the trial court in refusing to conduct an evidentiary hearing and in denying the motion for new trial on grounds of juror misconduct. First, defendant presented no evidence linking

McGraw or the alleged juror referred to in McGraw's declaration with the "lady" who allegedly was overheard by juror No. 1's husband. Second, defendant presented insufficient evidence that the person McGraw talked to was in fact a juror or alternate juror in the case. Third, assuming McGraw did talk with a juror, nothing in McGraw's declaration suggests that by virtue of her conversation with the juror, the juror was apprised of information creating a bias against defendant. The trial court could reasonably have concluded that McGraw's statement to the juror that "this was a 'three strikes' case and that [defendant] could be imprisoned for life if convicted," if anything generates juror sympathy for, rather than bias against the defendant. Fourth, the court could reasonably reject McGraw's declaration as lacking credibility based on McGraw's criminal record, her relationship with defendant, and her delay in reporting the alleged conversation with the juror. On the record before us, the court could also reasonably conclude an evidentiary hearing would be an unwarranted "fishing expedition" and that there was insufficient evidence establishing juror misconduct.

III. *The Motion For A Continuance Was Properly Denied*

Defendant contends the court erred in denying his request for a continuance made just prior to commencement of jury voir dire.

Defense counsel William Pendergast was appointed in January 2003, after the court granted defendant's *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118). On August 1, 2003, the court denied defendant's *Marsden* motion but granted defendant a two-month continuance of trial. In September, the court granted defendant's motion to remove a bail hold (§ 1275.1). On October 23, 2003, the court denied defendant's motion for substitute counsel, but granted his request to continue trial to November 13.

On November 10, Pendergast filed the instant motion pursuant to Penal Code section 1050 to continue the start of trial in order for defendant to retain private counsel. Pendergast's declaration stated that after spending several months discussing the possibility of retaining attorney Lael Kayfetz, Kayfetz declined the representation due to the press of another matter. Pendergast stated that immediately upon learning of Kayfetz's unavailability, defendant attempted to discuss his representation with three

other attorneys. He also stated that, at previous *Marsden* hearings, defendant informed the court of his intention to retain private counsel, and defendant, with the help of his family, had the means to retain private counsel.

On November 13, 2003, the court considered both the motion for a continuance and a *Marsden* motion. Pendergast noted that Attorney Lenny Oldwin had engaged in discussions with defendant's family about being retained, had agreed upon a fee and was "outside in the hall." Pendergast stated that Oldwin said he would substitute in as counsel if defendant's family brought the "fee," although Pendergast did not know whether that had occurred. Pendergast conceded that defendant could have retained private counsel months or years before, but the need had not arisen until defendant became dissatisfied with Pendergast's services. Pendergast acknowledged that any continuance granted would extend for "months" in order for new defense counsel to prepare for trial. However, he argued that the inconvenience in granting a continuance was not unreasonable when weighed against defendant's rights to counsel and due process.

The prosecutor objected to both motions as untimely and unjustifiably dilatory. The prosecutor also argued that a continuance would prejudice the People because of the age of the case and the frustration of witnesses, who were repeatedly subpoenaed and had become reluctant to testify.

The court gave the following reasons for denying both the *Marsden* motion[6] and the motion for a continuance: "This is the twelfth trial date for this case. This thing has been lingering since [defendant] has been in custody, January of the year 2000. . . . There is absolutely no showing of good cause. To use the legal expression 'unjustifiably dilatory' when assigning fault to the defendant for not getting counsel earlier, that is the height of diplomacy. I do not mean to overreact, but I find each of these motions border on being insulting." Subsequently, defendant unsuccessfully moved for new trial on the ground that the court erred in denying a continuance so as to substitute counsel.

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[6] Defendant does not appeal the denial of this *Marsden* motion.

A court's decision to deny a defendant's request for a continuance to seek private counsel is reviewed for abuse of discretion. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367.)

Defendant argues that the court erred in denying the motion for continuance based on its frustration with the past history rather than on the current circumstances of the case and the merits of the motion. He asserts that the motion, made in the midst of attempts to retain several attorneys, a recent bail-source hearing approving third party monies and recent dissatisfaction with Pendergast, does not suggest dilatory intent, despite the past delays in the case. He notes that both the defense and prosecution had previously been granted continuances, and asserts that the court did not inquire as to the length of continuance that would actually be requested.

We conclude denial of the motion for continuance was not an abuse of discretion. The record does not establish that defendant had actually secured the funds to retain Oldwin and that Oldwin had actually been retained. Although Oldwin was apparently "outside in the hall," defendant did not seek his presence in the courtroom to state whether he had been retained and, if so, how long a continuance was necessary. This, plus the numerous prior delays in the case, the prosecution's concern that witnesses were frustrated and becoming reluctant to testify, and the poor health of one of the witnesses, justified the court's refusal to grant a continuance on the first day of trial. Consequently, defendant's new trial motion made on that ground was properly denied.

IV. *The Marsden Motion Was Properly Denied*

Next, defendant contends the court erred in denying his *Marsden* motion for substitute counsel made following opening statements.

Immediately after opening statements, defendant made a *Marsden* motion on the ground that in the three weeks before trial Pendergast had failed to visit him to review the pretrial motions, police report, and preliminary hearing transcript. The court summarily denied the motion as untimely and thereafter stated it was unclear as to whether defendant was attempting to move for self-representation (*Faretta v. California* (1975)

422 U.S. 806). Pendergast offered to rebut defendant's assertions and offered to clarify with defendant whether defendant was seeking to represent himself.

After talking with defendant, Pendergast stated that defendant intended to make a *Marsden* motion but not a *Faretta* motion. Pendergast acknowledged that he had failed to visit defendant as promised on Sunday, but had seen him on Monday and at least twice recently, and would see him once or twice before defendant testified. Pendergast stated he and defendant had gone over defendant's testimony and the overall defense strategy, but had not gone over every transcript and police report because it was not necessary to do so. Pendergast stated that if the court continued to deny defendant's *Marsden* motions, he and defendant were prepared to proceed with Pendergast as counsel. Defendant agreed.

The court reaffirmed its ruling and noted that Pendergast had no obligation to give defendant the police reports or transcripts. Pendergast and defendant agreed that defendant was in possession of such reports and transcripts.

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation . . . , the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

Defendant contends the court's summary and truncated denial of his *Marsden* motion without inquiry or an in camera hearing was error. He argues his *Mardsen* motion was not a serial, dilatory motion that could be denied summarily on the ground of untimeliness. He argues that the deprivation of his right to counsel is reversible error.

Contrary to defendant's assertion, the court permitted defendant to explain the basis of his contention and the specific instances of Pendergast's alleged inadequate performance. Pendergast rebutted defendant's assertion, stating that he had visited defendant recently and defendant was in possession of the reports and transcripts at issue. Trial tactics are usually left to the discretion of trial counsel and counsel's exercise of that discretion must be reasonable and informed. (*In re Visciotti* (1996) 14 Cal.4th 325, 348.) Here, defendant failed to establish that Pendergast was unprepared to make the necessary tactical decisions prior to and during trial. In addition, the motion to discharge counsel made during trial, would, if granted, have resulted in either significant delay or a mistrial. (*People v. Smith, supra*, 30 Cal.4th at p. 607.) We conclude that defendant has failed to demonstrate that denial of his *Marsden* motion was error.

V. *The CALJIC No. 12.85 Instruction Is Not Unconstitutional*

Defendant contends the jury instruction given regarding section 2800.2 creates an unconstitutional mandatory presumption by relieving the prosecution of proving the ultimate fact of willful or wanton disregard.

Section 2800.2 defines the offense of driving in a willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer. Section 2800.2 provides: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. . . . [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

In accordance with section 2800.2, the jury was instructed in relevant part with CALJIC No. 12.85 which provides: "A willful or wanton disregard for the safety of persons or property also includes, but is not limited to, driving while fleeing or

attempting to elude a pursuing police officer during which time the person driving commits three or more Vehicle Code violations, such as Vehicle Code [section] 22348 (Excessive Speed) or 22450 (Failure to Stop), or damage to property occurs."[7]

Defendant contends the instruction constituted a conclusive presumption of the willful or wanton element of section 2800.2, in violation of his due process right to have the prosecution prove every element of the charged offense beyond a reasonable doubt. Defendant concedes that the identical constitutional argument was rejected by the Second District in *People v. Pinkston* (2003) 112 Cal.App.4th 387, 390-394 (*Pinkston*). After reviewing the legislative history of section 2800.2, *Pinkston* held that the language of section 2800.2, subdivision (b) does not state a mandatory presumption because it does not direct the jury to presume an ultimate fact from the existence of other facts. Instead, it "merely defines, in precise terms, one way in which the People may prove the element of willful or wanton disregard for the safety of persons or property. CALJIC No. 12.85 correctly repeated the statutory definition. Thus, neither Vehicle Code section 2800.2 nor CALJIC No. 12.85 relieved the People of the burden of proving each element of the charged offense beyond a reasonable doubt, and the trial court properly instructed the jury." (*Pinkston*, *supra*, 112 Cal.App.4th at p. 394.)

Defendant's argument has more recently been rejected in *People v. Diaz* (2005) 125 Cal.App.4th 1484, 1487, *People v. Williams* (2005) 130 Cal.App.4th 1440, 1446, and *People v. Laughlin* (2006) 137 Cal.App.4th 1020, 1028. These cases agreed with *Pinkston* that section 2800.2 defines the wanton or willful element in terms of three or more specified traffic violations and as such establishes a rule of substantive law rather than creating a presumption that varies the burden of proof. We agree with the analysis of these cases and therefore reject defendant's claim of instructional error.[8]

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[7] The jury was also instructed with the definitions of sections 22450 and 22348.

[8] After asserting that section 2800.2 and CALJIC No. 12.85 create a mandatory presumption, defendant states that "even if the presumption is permissive," it is "an irrational unconstitutional presumption." As *Laughlin* noted, section 2800.2, subdivision (b) "does not contain a presumption. It sets forth a definition of conduct that is deemed

VI. *Any Instructional Error Regarding the Definition of Speeding Is Harmless*

The court instructed the jury that it could find defendant had a willful or wanton disregard for safety for purposes of violating section 2800.2 based, in part, on a violation of "section 22348 (excessive speed)."[9] With regard to section 22348, the court instructed: "No person shall drive a vehicle upon a highway with a speed limit established at a speed greater than that speed limit."

Defendant concedes that the instruction given was adequate to define the violation of driving faster than the posted freeway maximum pursuant to section 22348. However, he contends the instruction was erroneous because it was broad enough to include violations of the basic speed law (§§ 22350-22351),[10] i.e., violations of posted speed limits other than maximum freeway limits. The thrust of defendant's argument is

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to be the legal equivalent of willful or wanton disregard for purposes of section 2800.2." (*People v. Laughlin, supra,* 137 Cal.App.4th at pp. 1027-1028.)

[9] Section 22348 provides, in relevant part: "(a) . . . a person shall not drive a vehicle upon a highway with a speed limit established pursuant to Section 22349 or 22356 at a speed greater than the speed limit. [¶] (b) A person who drives a vehicle upon a highway at a speed greater than 100 miles per hour is guilty of an infraction . . . ."

Section 23349, subdivision (a) provides in relevant part that "no person may drive a vehicle upon a highway at a speed greater than 65 miles per hour."

[10] Section 22350 makes it unlawful to "drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Section 22351 defines the prima facie speed limit. Section 22351, subdivision (b) provides: "The speed of any vehicle upon a highway in excess of the prima facie speed limits in Section 22352 or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing."

Section 22352, subdivision (a)(2)(A) sets the prima facie speed limit at 25 miles per hour "[o]n any highway other than a state highway, in any business or residence district unless a different speed is determined by local authority under procedures set forth in this code."

twofold. First, he argues that because exceeding lesser posted speed limits is only a presumptive violation, not an automatic violation, the instruction reduced the prosecutor's burden of proof. He notes that in closing argument, the prosecutor argued that defendant was exceeding the maximum speed limit on both the freeway and on surface streets. Second, defendant argues that the instruction given failed to define the excessive speed violation in terms of safety. He argues that reversal per se of his section 2800.2 conviction is required because it cannot be determined whether the jury's verdict rested on his violation of the basic speed law or his wanton disregard for safety.

"The trial court is required to instruct the jury on the points of law applicable to the case. [Citation.] No particular form is required as long as the instructions are complete and correctly state the law." Instructions may be read together and understood in the context in which they were presented to the jury. Whether the jury has been correctly instructed depends on the entire charge of the court. (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) "[E]ven in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) "An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury." (*Tatman, supra,* 20 Cal.App.4th at pp. 10-11.)

Even assuming the trial court erred in failing to provide additional instructions regarding the basic speed law, any such error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 17-18; *People v. Flood* (1998) 18 Cal.4th 470, 499.) Police Officers Ehman and Ramsey testified that while on the freeway, the Mercedes driven by defendant reached speeds in excess of 100 miles per hour while other motorists tried to get out of the way. Defendant himself testified that while drinking a beer, his freeway speed approached 90 to 95 miles per hour. In addition, while being pursued by the police on city streets, defendant drove at 50 to 70 miles per hour in a 25 miles per hour zone and caused property damage by crashing into a parked car. Given

the undisputed evidence that defendant drove in excess of any applicable speed limits, and caused property damage, any instructional error is harmless.[11]

VII. *No Unanimity Instruction Was Required*

Next, defendant contends the trial court erred by not instructing the jury sua sponte regarding unanimity with CALJIC No. 17.01, or its equivalent. CALJIC No. 17.01 states: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] or [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she]committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or [omission] agreed upon be stated in your verdict." (CALJIC No. 17.01 (Apr. 2006 ed.).)

Defendant argues that because the prosecutor relied upon "an array" of Vehicle Code violation offenses as well as an act of property damage to support the section 2800.2 charge, the court's failure to give a unanimity instruction violated his rights to jury trial and due process. In reliance on *People v. Mitchell* (1986) 188 Cal.App.3d 216, 221-222 (*Mitchell*), the People rejoin that the different Vehicle Code violations upon which the prosecution relied were merely theories of guilt, alternate ways of proving the willful or wanton disregard element of section 2800.2, and not elements of the crime, so that unanimity as to the particular traffic offenses was not required.

In *Mitchell*, the defendant was charged with violating section 23153, driving a vehicle while under the influence of alcohol and/or drugs, and concurrently committing an act forbidden by law that caused injury to another person. (*People v. Mitchell*, *supra*,

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[11] Given our determination that any instructional error is harmless, we need not address defendant's claim that his defense counsel's failure to seek clarifying instructions constitutes ineffective assistance of counsel.

188 Cal.App.3d at p. 218.) The alleged acts forbidden by law were a violation of the basic speed law (§ 22350) and engaging in a speed contest (§ 23109, subd. (a)). The defendant argued that the court erred in not instructing the jury sua sponte that it had to unanimously agree on the acts forming the offense, the section 22350 violation, the section 23109 violation, or both. (*Mitchell*, *supra*, 188 Cal.App.3d at p. 219.) The court disagreed holding that because "the charges of violating the basic speed law and engaging in a speed contest are merely theories of guilt proposed by the prosecution, as to which the rule is [that] the jurors need not be instructed that to return a verdict of guilty they must all agree on the specific theory—it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged as it is defined by the statute." (*Id.* at pp. 221-222.) "The unsafe speed and speed contest elements of the [driving under the influence of alcohol] charge here fall within the category of alternate ways of proving a necessary element of the same drunk driving charge. It follows under this analysis [that] the instruction was not required." (*Id.* at p. 222.)

Defendant argues that *Mitchell* is distinguishable because the statute in that case (§ 23153) required proof of "an" act forbidden by law, making the specific violations merely alternative theories of guilt. We reject this argument and find *Mitchell* analogous.

As we noted, *ante*, a willful or wanton disregard for the safety of persons or property may be shown by evidence of three or more traffic "point" violations or by the occurrence of property damage, if done "while fleeing or attempting to elude a pursuing peace officer." (§ 2800.2, subd. (b); *People v. Sewell* (2000) 80 Cal.App.4th 690, 697, overruled on other grounds in *People v. Howard* (2005) 34 Cal.4th 1129, 1138-1139.) To the extent the prosecutor relied on more than one traffic violation and/or property damage to prove the willful or wanton disregard element of the section 2800.2 charge, it was sufficient that each juror was convinced beyond a reasonable doubt that defendant violated any combination of three traffic violations or that property damage occurred, the alternative theory by which the willful or wanton element could be proven. Jury unanimity was required only as to the willful or wanton element, not on the alternate

factual bases for that element. Consequently, the court did not err in failing to give a unanimity instruction.

VIII. *CALJIC No. 2.21.2 Was Properly Given*

Defendant contends the court erred in instructing the jury pursuant to CALJIC No. 2.21.2: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." He argues that the instruction improperly violated his right to due process by permitting the jury to evaluate the credibility of his testimony and the testimony of various prosecution witnesses by a probability standard rather than a reasonable doubt standard.

As the People note, defendant specifically requested CALJIC No. 2.21.2. Since the court had no sua sponte duty to instruct in a manner contrary to defendant's request, an appellate attack on the instruction as requested is barred by the doctrine of invited error and forfeits the challenge on appeal. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1191, fn. 2.)

Even if cognizable, defendant's argument fails on the merits. (See *People v. Maury* (2003) 30 Cal.4th 342, 428-429; accord, *People v. Jurado* (2006) 38 Cal.4th 72, 127.) " ' "CALJIC No. 2.21 does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute." ' " (*Maury*, *supra*, 30 Cal.4th at p. 429.) Further, in addition to CALJIC No. 2.21.2, the trial court instructed the jury on the reasonable doubt standard (CALJIC No. 2.90) and to consider the instructions as a whole (CALJIC No. 1.01). Thus, the jury was adequately informed that the charged offenses were subject to the reasonable doubt standard of proof.

IX. *CALJIC No. 2.90 Is Not Constitutionally Infirm*

Next, defendant contends that instructing the jury with CALJIC No. 2.90 constitutes structural error because that instruction conveys an uncertain quantum of proof akin to clear and convincing evidence. The challenged portion of CALJIC No. 2.90 reads: "Reasonable doubt is defined as follows: It is not a mere possible doubt;

because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

Once again, we conclude that defendant expressly requested that the court give the CALJIC No. 2.90 instruction, thereby waiving his challenge thereto. (*People v. McPeters, supra,* 2 Cal.4th at p. 1191, fn. 2.)

In any case, in *Victor v. Nebraska* (1994) 511 U.S. 1, 16-17, 22-23, the United States Supreme Court upheld California's former statutory reasonable doubt instruction, but criticized its "moral certainty" phrase. Subsequently, in *People v. Freeman* (1994) 8 Cal.4th 450, 503 (*Freeman*), the California Supreme Court recommended that trial courts delete the "moral certainty" language from CALJIC No. 2.90 and use the definition of reasonable doubt with which the trial court instructed the jury in this case. The Legislature subsequently modified the reasonable doubt definition in Penal Code section 1096 accordingly.

Following *Freeman*, identical challenges to CALJIC No. 2.90 have been rejected by this court and numerous other courts of appeal. (See *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1208, and cases cited therein.) We again reject defendant's claim of error.

X. *The Court Properly Refused To Dismiss The Prior Strike Allegations*

Next, defendant contends the court abused its discretion in refusing to dismiss the prior strike allegations in connection with the section 2800.2 offense in the interest of justice. (Pen. Code, § 1385; see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.)

Defendant's trial counsel moved to dismiss defendant's two prior strike convictions on several grounds. First, in committing the current robbery he used minimal force, the elderly victim was neither injured nor sought restitution, and the robbery took place during daylight in a bar where he was a regular customer. Second, the current section 2800.2 offense was not "aggravated," since "it took place at night on a freeway

and did not involve particularly excessive speeds;" and the crash which ended the chase resulted from a defect in the roadway. Third, the two prior robbery strikes were based on a single prosecution which occurred nearly 20 years previously and for which he received probation. Thereafter, his three drug-related convictions indicate that his primary problem is his alcoholism. Fourth, despite his alcoholism, he is a "striving, responsible man."

The probation department's presentence report, which was considered by the trial court, included facts regarding defendant's prior felony convictions. The two strike counts each involved a robbery of a cab driver on the morning of March 6, 1985. As to the first robbery, defendant told the victim he needed change, and thereafter struck the victim in the face several times, grabbed the victim's money and fled. As to the second robbery, defendant asked the victim if she had change, then grabbed and held the victim, took the victim's wallet and fled. Defendant was initially granted probation, but violated that probation five months later by possessing a controlled substance. In July 1991, defendant committed a commercial burglary of a department store, petty theft with a prior, and evading an officer with wanton or willful disregard for safety. In March 1994, defendant committed grand theft of a person by grabbing winning racetrack tickets from the owner's hand. In 1995, defendant committed battery with serious bodily injury by attacking the victim after accusing him of stealing defendant's friend's pager.

The probation report stated: "The defendant has a lengthy and significant criminal history, which involves prior assaultive behavior. He has performed poorly on community supervision, and was on parole when he committed the instant offense. He is ineligible and inappropriate for probation."

In denying the motion to dismiss the prior strike convictions, the court stated that defendant's criminal record "literally fits most every aspect of the three strike[s] law. [¶] . . . [H]e spent essentially 15 out of the last 19 years in prison; 11 felonies counting these in 19 years, continuous criminal conduct, being on parole during many of these offenses, having violated parole five times. I think that's sufficient."

Pursuant to Penal Code section 1385, a trial court may strike or vacate a prior felony conviction allegation or finding "in furtherance of justice." (*People v. Superior Court (Romero), supra,* 13 Cal.4th at pp. 529-530.) In doing so the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes law's] spirit, in whole or in part, and hence should be treated as though [he or she] had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The trial court's ruling will not be overturned on appeal unless it " 'falls outside the bounds of reason.' " (*Id*., at p. 162.)

Defendant contends the court abused its discretion "[i]n failing to consider the *quality* of past and *current* convictions and the age and overall character of this offender as to a second third-strike count, [and] an evasion of police in which no one was injured." We conclude there was no abuse of discretion.

The prior strike convictions for robbery involved conduct that caused or at the very least, posed the risk of causing serious personal harm. In addition, the instant robbery was a violent offense even if it did not result in injury to the victim. (See Pen. Code, § 667.5, subd. (c)(9) [any robbery constitutes a violent felony under § 667.5].) The purpose of the three strikes law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Pen. Code, § 667, subd. (b); *People v. Strong* (2001) 87 Cal.App.4th 328, 337.) Notwithstanding defendant's assertion that his criminal history is in large part due to his alcoholism, his conduct establishes a nearly continuous pattern of serious and violent crime. Consequently, the court could reasonably conclude that defendant was well within the spirit of the three strikes law and decline his request to strike the prior strike allegations.

XI. *Cruel and Unusual Punishment*

Defendant contends the 50-years-to-life sentence imposed upon him constitutes cruel and unusual punishment in violation of article I, section 17 of the California

Constitution and of the Eighth Amendment of the United States Constitution. He references the arguments made in his *Romero* error claim, in particular the fact that because he was 41 years old at the time of sentencing, in all likelihood the lengthy prison term precludes the possibility of parole within his lifetime. Defendant has waived this issue by not raising it at sentencing. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) However, to forestall a claim of ineffective assistance of counsel, we address the issue on the merits.

A. *Federal Standard*

In order to establish that his sentence constitutes cruel and unusual punishment under the federal Constitution, defendant must show that the term imposed is grossly disproportionate to his offense. (*Lockyer v. Andrade* (2003) 538 U.S. 63 (*Andrade*); *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*).) Successful proportionality challenges are exceedingly rare. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) In *Andrade* the United States Supreme Court rejected a cruel and unusual punishment challenge to two consecutive 25-year-to-life terms for shoplifting about $150 in videotapes. (*Andrade*, *supra*, 538 U.S. at pp. 66, 70, 77.) In *Ewing*, it held that a 25-year-to-life sentence for stealing three golf clubs each valued at about $400 did not establish the requisite disproportionality required for an Eighth Amendment violation. (*Ewing*, *supra*, 538 U.S. at pp. 28, 30-31.)

Defendant has a serious and extensive criminal history, including assaultive behavior. As the trial court noted, defendant has exhibited nearly continuous criminal conduct, was on parole during many of his offenses, including the instant offenses, and has violated parole five times. Given this criminal history, defendant has failed to establish the requisite disproportionality under the Eighth Amendment.

B. *California Standard*

Article I, section 17 of the California Constitution bars punishment so disproportionate to the crime " 'that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085 (*Carmony*), citing *In re Lynch* (1972) 8 Cal.3d 410, 424.) Relevant considerations are

"the facts of the current crime, the minor nature of the offense, the absence of aggravating circumstances, whether it is nonviolent, and whether there are rational gradations of culpability that can be made on the basis of the injury to the victim or to society in general." (*Carmony*, *supra*, 127 Cal.App.4th at p. 1085.) In *Carmony*, a third-strike sentence was held invalid where the new offense was the failure to update his sex offense registration within five working days of a birthday, and the defendant had duly registered his address a month earlier, the strikes were remote aggravated assaults against a girlfriend and the defendant had since led a responsible life. (*Id*. at pp. 1071, 1077-1080, 1086-1088.)

Here, defendant's current offenses were dangerous and not just technical violations, his prior strikes were serious and violent, and his interim conduct shows a nearly continuous pattern of criminality with numerous violations of parole. Consequently, defendant has failed to establish a claim of cruel and unusual punishment.

XI. *Blakely v. Washington*

Defendant contends the court's imposition of mandatory consecutive indeterminate terms was a violation of *Blakely v. Washington* (2004) 542 U.S. 296. In *People v. Black* (2005) 35 Cal.4th 1238, 1244, our Supreme Court held, "the judicial fact-finding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." In accordance with principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we must reject defendant's argument.

XII. *The Custody Credit Limitation in Penal Code Section 2933.1 Was Erroneously Applied*

Finally, defendant contends, and the People concede, the court erred in applying the Penal Code section 2933.1[12] 15 percent limitation of presentence custody credits for violent felonies based on his robbery conviction. He asserts that the September 1999 robbery occurred before the March 2000 enactment of Proposition 21, which added robbery to the list of qualifying violent felonies in Penal Code section 667.5. Consequently, he argues that the court's application of the credits provision violates the prohibition against ex post facto laws (see *In re Lomax* (1998) 66 Cal.App.4th 639, 646), and therefore the matter must be remanded with instructions to amend the abstract of judgment deleting any reference to a section 2933.1 credit limitation. We agree.

[12] Penal Code section 2933.1 provides that "[n]otwithstanding any other law, any person who is convicted of a felony offense listed in [Penal Code] section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in [Penal Code] section 2933."

DISPOSITION

The matter is remanded with directions to amend the abstract of judgment reflecting a recalculation of presentence custody credit without reference to Penal Code section 2933.1. The judgment is otherwise affirmed.

SIMONS, Acting P.J.

We concur.

GEMELLO, J.

REARDON, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.